NO. 5814

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

HARRY NIXON,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

# APPELLEE'S BRIEF

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF ALASKA, DIVISION NO. 1.

HOWARD D. STABLER,

*United States Attorney,*

*For Appellee.*

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### STATEMENT.

On March 25, 1929, at Ketchikan, Alaska, Harry Nixon, this appellant, was jointly tried with his grown son Al Nixon for a violation of the Alaska Bone Dry Act committed at Ketchikan on September 24, 1928. Harry Nixon was convicted; Al Nixon was acquitted.

According to appellant's statements in what purports to be a typewritten copy of a bill of exceptions served upon us (the transcript was not printed),

which does not contain any of the evidence in the case, it appears that on September 24, 1928, federal officers went to the Ketchikan hotel with a search warrant authorizing a search "of room 29 and a room immediately opposite said room 29 and across the hall of said hotel from said room 29". The officers first went to room 29 where they found the door open and Al Nixon lying on the bed. (P. 3 Bill Exceptions) Harry Nixon who was then and for some time had been occupying the room was temporarily absent from the premises. (P. 3 Bill Exceptions) Search of room 29 with the warrant disclosed three small glasses and a number of corks and two large drinking glasses. The officers then proceeded to room 35 across the hallway from room 29 where they found and seized 72 bottles of beer and 12 bottles of whisky, a cork screw, a funnel, a bag of corks, a bag of empty beer bottles and some whisky flasks, whereupon the officers returned to room 29 and in room 29 arrested Al Nixon for the unlawful possession of the articles seized in room 35 (p. 3 typed bill of exceptions). Immediately after arresting Al Nixon in room 29, and contemporaneously therewith (p. 1 Brown's affidavit in support of answer to petition to quash search warrant incorporated in bill of exceptions by reference) the officers then and there searched him and found on his person the key to room 29, which was not received in evidence; and then and there made further search of room 29 and found concealed in the bed on which Al Nixon had been lying a key fitting the

Sargent lock on the door of room 35 which was received in evidence. Harry Nixon was arrested the following day.

Appellant Harry Nixon expressly disclaimed any connection with room 35 (p. 3 typewritten copy of bill of exceptions; and page 1 of a typewritten copy of affidavit attached to bill of exceptions and incorporated by reference made by appellant in support of his motion to quash the search warrant).

The plan of the following argument is, first, argument upon the point that no search warrant was necessary for the seizure of the articles found in room 35, or for the key to room 35 found in room 29; and the record does not show that the remaining articles seized were received in evidence; and if they were, their evidentiary value was slight and no prejudice is shown; and second, argument that the search warrant was valid and seizure of all of the articles was lawful by virtue of it.

## ARGUMENT.

1. As appellant disclaims any connection with room 35, or the beer, whisky, cork screw, funnel, corks, empty beer bottles and the whisky flasks found there, he cannot be heard to complain of an illegal search of room 35; or the use in evidence against him of the liquors and other articles found in such room.

*Nielson v. U. S.* (CCA-9) 24 Fed. (2nd) 802,

*Armstrong v. U. S.* (CCA-9) 16 Fed. (2d) 62,

*Lewis v. U. S.* (CCA-9) 6 Fed. (2d) 222,

*Driskill v. U. S.* (CCA-9) 281 Fed. 146.

In the Armstrong Case, this court said:

> "Nor does the record show that the defendant made any claim either to the premises searched or the property seized, and in the absence of such claim, cannot urge unreasonable search upon which to base a constitutional right."

In the Lewis Case, this court said:

> "Plaintiffs in error in their petition to suppress made no claim to the premises searched or to the property seized, and, in the absence of such a claim, they are in no position to raise the objection that the search was unreasonable or unauthorized, or that their Constitutional rights were invaded."

There remains then the question of whether the articles seized in appellant's room 29 were seized and introduced in evidence against him in violation of his Constitutional rights.

When the officers first went to room 29 they found there and seized three small glasses and a number of corks and two large drinking glasses. The seizure of these articles could only be sustained by authority of the search warrant. After finding the intoxicating liquors and other articles in room 35 the officers returned to room 29 and there arrested Al Nixon for the unawful possesssion of the intoxicating

liquors in room 35, and immediately searched his person and again searched room 29, and upon this search and not before found the key to room 35 concealed in the bed in room 29 on which Al Nixon had been lying.

While seizure of the three small glasses, corks and two large drinking glasses could only be sustained by virtue of the search warrant, the same result does not follow as to the key to room 35 seized contemporaneously with the arrest of Al Nixon in room 29. The seizure in room 29 of the key to room 35 under the circumstances related was lawful, and no search warrant was necessary; and its use in evidence was lawful.

*Nordelli v. U. S.* (CCA-9) 24 Fed. (2d) 665.

*Marron v. U. S.* (CCA-9) 18 Fed. (2d) 218; aff. 275 U. S. 192, 48 Sup. Ct. 74.

*Sayres v. U. S.* (CCA-9) 2 Fed. (2d) 146.

In the Marron Case, it appeared that Marron was the lessee of the premises searched with a search warrant, but was not present when the search was made. Birdsall was in charge, and was arrested for crime committed in the presence of the officers. A ledger and bills were seized and put in evidence against Marron who had petitioned their return and suppression. The Supreme Court held the seizure of the ledger and bills not justified by the search warrant, but held their seizure lawful by virtue of seizure contemporaneously with the arrest of Birdsall.

The Supreme Court in affirming the judgment against Marron said:

> "The officers were authorized to arrest for crime being committed in their presence and they lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise.
>
> . . . It follows that the ledger and bills were lawfully seized as an incident of the arrest."

In the Nordelli Case, this court said:

> "The officer was within his rights, and it was his duty to make an arrest of those defendants, and that thereupon the law gave him, as well as the other officers, the right to search the defendants or either of them, and also to search the room in which the arrest was made, and also the rest of the house which was occupied and used by them at the time."

Even though we should assume that the remaining articles seized in appellant's room 29, to wit, the three small glasses, a number of corks, and two large drinking glasses, were seized unlawfully by the officers, it does not follow that they were received in evidence against him in violation of his Constitutional rights. To justify appellant's contention made that this court ought to reverse this case, he ought to point out particularly and convincingly, not that these particular articles were seized unlawfully, but that they were prejudicial and received in evidence against the appellant in violation of his Constitutional rights. It would seem impossible for

the court, under the present record before the court, to determine whether they were offered and received in evidence at all; and, if they were received, whether they were sufficiently prejudicial to justify reversal.

Appellant's motions to quash and suppress were directed to all of the articles seized in rooms 29 and 35 by virtue of the search warrant. No specific mention was made of these particular articles, and, as we remember the case, no particular significance was attached to them because of their slight evidentiary value. The key to room 35 seized in appellant's room 29 was the particular thing appellant endeavored to have suppressed. Having disclaimed any connection with room 35, appellant did not seriously urge the suppression of the articles seized in room 35.

Without at least some of the evidence before this court showing the admission of these articles in evidence, and the particular objections made and rulings thereon, it is believed impossible for the court to determine whether these particular articles were received in evidence at all; or if they were received, whether they were received specifically, or generally with the other exhibits which for the reasons just stated were properly received; or what specific objections, if any, were made to them in evidence; or what the court's ruling was, and whether exception was properly preserved; or if they were introduced in evidence improperly, whether the effect was

sufficiently prejudicial to warrant reversal. The court should not have to assume any of these things. It is appellant's duty to make them clear. According to our recollection, but which we should not have to depend upon, we seriously question whether these particular articles were received at all.

In the case of *Simpson v. U. S.* 289 F. 188 and in *Marron v. U. S.* 18 Fed. (2d) 218, this court said:

> "In reviewing a judgment in an appellate court, the burden is on the plaintiff in error to show that error in the admission of testimony was prejudicial."

It is respectfully contended that the seizure of the articles in room 35 and their introduction in evidence against appellant was lawful because appellant expressly disclaimed any connection with room 35 and the articles seized therein; that the seizure of the key to room 35 in room 29 was lawful as incidental to the lawful arrest of Al Nixon, the seizure being lawful, its introduction in evidence was lawful; and that if the remaining articles seized were introduced in evidence, which fact is not shown by the record, their evidentiary value was slight, and prejudice has not been shown, and therefore, the judgment of the lower court ought to be affirmed.

2. The search warrant was valid. Appellant contends that the evidence against him was obtained through search of his premises with a void search warrant; void in that there was not sufficient and

competent evidence before the magistrate to show probable cause for issuing it.

The search warrant authorized a search of "room 29 of the Ketchikan hotel . . . and a room immediately opposite said room 29 and across the hall of said hotel from said room 29," and was based upon the affidavit of E. M. Harrold made before a notary public, and the affidavit of Deputy U. S. Marshal C. V. Brown made before the magistrate who issued the warrant. Both affidavits were submitted to the magistrate, and both were considered by him prior to his issuance of the warrant. The statement in appellant's brief (p. 3) that "Harrold was never before the commissioner who issued the search warrant. This is undisputed", and the statement (p. 7), "The search warrant refers to the affidavit of Harrold only, which it is conceded was not taken before the commissioner," should not be construed so as to infer that the commissioner did not have before him and consider in finding probable cause for the issuance of the warrant the affidavit made by Harrold, as well as the affidavit made by Brown. The commissioner had before him and considered both affidavits in finding probable cause for issuing the warrant.

The search warrant bearing the date September 24, 1928, copy whereof is incorporated in the bill of exceptions, shows on its face that the affidavit of Harrold was considered by the magistrate, for on the face of the search warrant are the words, "proof

by affidavit having this day been made before me by E. M. Harrold", etc. Brown's affidavit for search warrant dated September 24, 1928, also incorporated in the bill of exceptions shows on its face that it was taken before the same magistrate who issued the search warrant based upon Harrold's affidavit. This, we think, clearly shows that the magistrate had before him and considered both affidavits in finding probable cause. (No transcript of the record in this case has been furnished us, and as the fact of the magistrate having before him and considering both affidavits does not clearly appear in any of the appeal papers of which copies were served upon us, a certified copy of the magistrate's affidavit dated March 29, 1929, submitted with appellee's answer to the petition and motion to suppress evidence and quash search warrant showing the fact will be filed in the case, and printed in this brief following the argument.)

The affidavit of E. M. Harrold sworn to before a notary public, which was submitted to the magistrate by Mr. Brown with his own affidavit, was as follows:

> "That on Sunday September the 23rd, 1928, I went to the Ketchikan hotel, situated . . . and in room 29 met a man known to me as Al, a young man, and another man known to me as Harry Nixon, and said Harry Nixon sold me a pint flask of whiskey for which I paid him $2.50 cash. He got this whiskey directly across the hall in a room without any number on, but

this room is directly opposite room 29, and on the right hand side of the hall going to room 29 from the stairs."

The affidavit of C. V. Brown, also submitted to the magistrate, was as follows:

"... And this deponent further says that on the 23d day of Sept. 1928, Harry Nixon sold to E. M. Harrold a pint flask of whiskey for which said E. M. Harrold paid said Nixon the sum of $2.50, and that he therefore has, and there is, probable and reasonable cause to believe, and that he does believe and states as true, that said Harry Nixon now has concealed in the following described premises, viz. room 29 and the room directly opposite said room 29 in the Ketchikan hotel . . . alcoholic liquors . . ."

Appellant contends the affidavit of Harrold is a nullity because sworn to before a notary public; and that Brown's affidavit is a nullity because it states nothing but conclusions.

In the case of *Hawker v. Queck* (CCA-3) 1 Fed. (2d) 77, Cer. den. 45 S. Ct. 99, 266 U. S. 621, a situation exactly similar to that in the present case arose. McClelland and Gibson made affidavits before notaries public showing sales of liquor. The court said:

"These affidavits were severally sworn to before notaries public by McClelland on June 30, and by Gibson on July 1, 1920, and on July 17, Connors, a prohibition agent appeared before Roger Knox, the United States Commissioner, and made oath to an affidavit for a day time

search warrant, reprinted from the record in the margin, in which, as will be seen after alleging that he has good reason to believe that 'in and upon the premises of Harry P. Queck, at ..... there has been and is now located and concealed a large amount of intoxicating liquor, to wit, whisky,' etc., the affidavit then states 'that the information obtained by your affiant in relation to the sale of liquor by the said Harry P. Queck on the 26th day of June, A. D. 1920, was obtained from affidavits made by William McClelland and Nelson Gibson.' On the same day the commissioner issued a day search warrant, wherein was recited the appearance of Gibson, the prohibition agent, before the commissioner, his oath, and reduction to writing of the agent's belief of whisky on the premises, the grounds of his belief, viz that 'the information obtained by said J. W. Connor in relation to the sale of liquor by the said Harry P. Queck was obtained by the said J. W. Connor, prohibition agent, from affidavits made by William McClelland and Nelson Gibson.' Upon this warrant a search was had . . . "

"Being of the opinion, then, that the record papers before the commissioner and the court showed probable cause for the issue of the warrant, the decree below, holding it invalid, is reversed."

In the foregoing case the court also said:

"We may further state that, while it was suggested at the argument that there was nothing to show that the affidavits of McClelland and Gibson were produced before the commissioner, we may add that, apart from the affidavits themselves being in the printed record, and the reference to them, both in the affidavit of Connor taken before the Commissioner and

> in the warrant itself, the court at bar inquired of counsel as to the facts, and later on was furnished with information that Gibson's and McClelland's affidavits had been before the commissioner when he issued the warrant, and before the court when it passed upon its legality."

This court followed the case of *Hawker v. Queck* in *Nordelli v. U. S.* 24 F. (2d) 665, 667, and said:

> "In *Hawker v. Queck* (CCA) 1 F. (2d) 77, it was held that an affidavit by a prohibition agent that he had good reason to believe and did believe that on premises designated liquor would be found, and that his information was obtained from affidavits made by named persons, which were before the magistrate and which showed the purchase of whisky, was held sufficient to show the existence of probable cause to legalize a search warrant. Certiorari was denied."

The affidavit of United States Commissioner Kehoe, printed in this brief at the conclusion of the argument, (a certified copy thereof has been filed in the case by appellee) shows that Brown presented to him the affidavit of E. M. Harrold, and at the same time made an affidavit himself, and that in finding probable cause he considered both affidavits. Counsel's statement (p. 4 Brief) that Harrold's affidavit was never even seen by the commissioner in connection with the application for the warrant, is not correct.

Such being the case, the *Hawker v. Queck* case is practically in point with the facts of the case at bar.

There is this difference, however. Brown did not state in his affidavit that he based his information upon the affidavit of Harrold. And it was not necessary that he should make such a statement for it appears that Brown had direct information of the facts alleged in his own affidavit.

When this matter came before the trial court upon the petition to quash the search warrant, an answer to the petition was made and filed by appellee, which answer was supported by Brown's affidavit dated March 20, 1929. This answer and affidavit is referred to in the typewritten bill of exceptions served upon us as "Answer to petition to quash search warrant and affidavit in support thereof". In this bill of exceptions the further statement is made that the same "are hereto attached and made a part hereof".

> It appears by this affidavit made by Brown that,
>
> "Brown ..... gave E. M. Harrold on September 23, 1928, the sum of $5.00 for the purchase of whisky; that he watched said Harrold go to the Ketchikan hotel and emerge therefrom in a few minutes; that Harrold thereupon gave him a bottle of whisky and the change; and immediately thereafter made an affidavit reciting the facts of said sale to him which affidavit is now on file in the above entitled cause. That affiant thereupon executed affidavit for search warrant as appears by the files herein ....."

Therefore, when Brown in his affidavit made before the United States Commissioner the following day said,

> "that on the 23d day of Sept. 1928, Harry Nixon sold to E. M. Harrold a pint flask of whisky for which said E. M. Harrold paid said Nixon the sum of $2.50, and that he therefore has, and there is, probable and reasonable cause to believe and that he does believe and states as true .....,"

he stated facts within his own knowledge, excepting probably the fact of who made the sale to Harrold, and he learned that fact from the sworn affidavit of Harrold.

Both affidavits are positive in form. They were both submitted to the magistrate; and both were considered in finding probable cause. We submit the showing of probable cause was sufficient to justify the issuance of the warrant.

The warrant commands a search of room 29 from which the key to room 35 was taken; and from which the three small glasses, a number of corks and two large drinking glasses were taken. It also commanded a search of a room opposite 29, which proved to be room 35, from which the whisky, beer and other articles were taken.

Therefore, the seizure being lawful by virtue of a valid search warrant, they were properly received in evidence.

Appellant also contends that the trial court erred and abused its discretion in overruling his motion for a new trial in which the point was made that Deputy Marshal Caswell who procured the sign-

ing of the Harrold affidavit and who was very active in the prosecution of the case, and who had charge of the execution of the search warrant, was permitted to take charge of the jury as bailiff after they had been deliberating for twenty-four hours; and that he had an opportunity to, and possibly did, influence one or more of said jurors.

The record shows that the court heard and considered the motion for new trial, and supporting affidavit submitted therewith, in which the foregoing point was made, and in its discretion overrued the motion. It is believed the court will follow its own precedents in disposing of this assignment.

In *Boyd v. U. S.* (CCA-9) 30 Fed. (2d) 900, this court said:

> "A motion for a new trial is addressed to the sound discretion of the trial court, and the granting or refusing of the same is not assignable as error, where, as here, the court considered all the affidavits in support of the motion, and after full hearing denied it in the exercise of a sound discretion."
> Similar rulings were made by this court in,
>
> *Brown v. U. S.* (CCA-9) 9 Fed. (2d) 588, cer. den. 46 S. Ct. 348.
>
> *Clements v. U. S.* (CCA-9) 297 Fed. 206.

The assignment is not well taken for another reason. The only showing made in support of the assignment is the affidavit submitted to the court with the motion. This affidavit was made by appellant's attorney in which the statement was made that

> "Caswell as such bailiff had an opportunity to, and possibly did, communicate with and influence one or more of said jurors."

No showing is made that communication was so had with any juror, or that any juror was so influenced; and no actual prejudice to appellant is shown, or even intimated.

Statement is made in the affidavit that Caswell, as shown by his testimony (which is not before the court) was greatly interested in securing the conviction of the defendant; but that fact cannot be determined without the testimony. Statement is also made that Caswell was interested in the case because he procured the signing of the Harrold affidavit; but the record shows that Brown and not Caswell had Harrold make and sign the affidavit. We submit there is no showing that Caswell had any particular interest in the case; that, at most, the court's appointment of this particular officer as bailiff was an irregularity within the meaning of the rule stated in 17 Corpus Juris 354, section 3714:

> "Mere irregularities in the custody of the jury during the trial which do not operate to defendant's prejudice will not authorize a reversal."

Appellant cites the case of *Johnson v. U. S.* (CCA-9) 247 Fed. 92; but the facts in the Johnson case were altogether different from the facts of the case at bar. In the Johnson case the officer selected the jury in a case in which the record clearly shows his personal interest.

We submit, therefore, the assignment does not justify reversal of the judgment.

The assignment made concerning the overruling of the motion for directed verdict is not well taken.

Where motion for directed verdict was overruled and an exception noted it is essential for proper review that the bill of exceptions contain all the testimony adduced, as well as the motion and order.

*Smith et al. v. U. S.* (CCA-9) 9 F. (2d) 386.

*Pauchet v. Bujac* (CCA-8) 281 F. 962, 966.

## CONCLUSION.

It is respectfully submitted therefore that such evidence as was introduced against appellant was lawfully obtained because,

(1) As appellant disclaimed any connection with room 35, no search warrant was necessary to seize the articles taken from that room; the key seized in room 29 was lawfully taken incidental to the arrest therein of Al Nixon and no search warrant was necessary to seize it; the remaining articles taken from room 29 are not shown by the record to have been received in evidence against appellant; and, if they were received, their evidentiary value was slight, and prejudice is not shown, and

(2) The evidence was obtained by a valid search warrant.

Therefore, the evidence being lawfully obtained, its introduction in evidence against appellant was not in violation of his Constitutional rights; and the judgment of the court below should be affirmed.

Respectfully submitted,

HOWARD D. STABLER,
*United States Attorney.*

"IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA. DIVISION NUMBER ONE. AT KETCHIKAN.

UNITED STATES OF AMERICA,
*vs.*
Harry Nixon.
No. 1092-KB
AFFIDAVIT

United States of America,
Territory of Alaska.
ss.

J. W. Kehoe, being first duly sworn, deposes and says that he is now and for several years last past, has been United States Commissioner for the precinct of Ketchikan, at Ketchikan, Alaska; that on the 24th of September, 1928, C. V. Brown presented the affidavit of E. M. Harrold, dated the 23d day of September, 1928, on file in the above entitled cause; and at the same time made an affidavit for a search warrant directing the search of room 29 and the room across the hallway therefrom, in the Ketchikan Hotel at Ketchikan; that he examined the applicant, C. V. Brown, under oath, and that in finding the existence of probable cause for the issuance of a search warrant, he had before him and considered the affidavits of both said E. M. Harrold and C. V. Brown as aforesaid, and upon such finding and determination of probable cause issued the search warrant filed in the above entitled court and cause.

J. W. KEHOE.

Subscribed and sworn to before me this 29th day of March, 1929.

JOHN H. DUNN,
Clerk of the District Court, District of Alaska, Division No. 1."

(Seal)